APPENDIX.

CEDAR RUST STATUTE, CODE OF VIRGINIA, 1919.

SECTION 885. Red cedar trees; declared public nuisance, when.—It shall hereafter be unlawful within this State for any person, firm or corporation to own, plant or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be) the source, harbor or host plant for the communicable plant disease commonly known as "orange" or "cedar rust," of the apple, and any such cedar trees, when growing within a radius of one mile of any apple orchard in this State, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owners of any such cedar trees to destroy the same as soon as they are directed to do so by the State entomologist, as hereinafter provided.

SECTION 886. In any county in this State where the above-mentioned disease exists, or there is reason to believe it exists, it shall be the duty of the State Entomologist, in person or by an assistant, upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received, to ascertain if any cedar tree or trees in said locality are the source of or constitute the host plant for the said disease known as "orange" or "cedar rust" of the apple, and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of an apple orchard in said locality. If upon such preliminary investigation of the localities from which said request is received it shall appear that there are cedar trees which constitute the source, harbor or host plant of said disease, and that said cedar tree or trees exist within a radius of two miles of any apple orchard or orchards in said locality and constitute a menace to the health to said apple orchard or orchards, the State Entomologist or his assistant, shall give notice in writing to the owner or owners of

said cedar tree or trees to destroy the same; such notice shall contain a brief statement of the fact found to exist whereby it is deemed necessary or proper to destroy said cedar trees and call attention to the law under which it is proposed to destroy said cedar trees, and the owner or owners shall within such time as may be prescribed in such notice by the State Entomologist cut down and destroy said cedar trees.

SECTION 887. If, however, in the judgment of the State Entomologist it is practical to treat any such cedar tree or trees, especially ornamental trees in dooryards, graveyards, cemeteries and parks, which have been declared as aforesaid to constitute a menace to any apple orchard in said locality, in such a way as to render it or them harmless, he may direct such treatment to be carried out by the owner under the direction of any agent he may appoint for that purpose. Said directions for treatment shall be put in writing by the State Entomologist and a copy placed in the hands of said owner. Any owner undertaking to so treat his trees and refusing or failing to carry out said written directions shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

SECTION 888. The notice required under sections eight hundred and eighty-six and eight hundred and eighty-nine may be served upon the owner of said trees if a resident in the State in the manner prescribed by section six thousand and forty-one, or if such owner be not a resident of this State, by serving a copy of such notice upon his tenant or other person having charge of the premises.

SECTION 889. Whenever the owner or owners of said cedar tree or trees refuse or neglect to cut down or destroy the same within the time specified in the notice given by the State Entomologist as prescribed by section eight hundred and eighty-six, it shall be the duty of the State Entomologist to cause said trees to be at once cut down or destroyed and the necessary expense thereof shall be paid by his warrant on the county treasurer to be paid out of the general funds of the county and to be reimbursed as provided in section eight hundred and ninety-two.

On petition of ten or more reputable freeholders in any county or magisterial district in which this law has been made operative as provided in section eight hundred and ninety-three, the State Entomologist may arrange for the removal of cedar sprouts on land from which the cedars have already been removed, the necessary expense thereof being paid by his warrant on the county treasurer as provided above without the formality of serving a legal notice on the owner of the land.

SECTION 890. The State Entomologist, his assistant or employees are empowered with authority to enter upon any public or private premises for the purpose of carrying out the provisions of this chapter. Any person or persons who shall obstruct or hinder the said Entomologist, his assistants or employees in the discharge of their duties under this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

SECTION 891. Any owner finding objection to the order of the State Entomologist in requiring him to destroy his cedar tree or trees may appeal from said order to the circuit court of the county in which said trees are located, but said appeal must be taken within fifteen days from the date upon which the notice to destroy the same is served upon him. Notice in writing of said appeal must be filed with the clerk of said court who shall forthwith transmit a copy thereof to the State Entomologist. The filing of said notice shall act as a stay of the proceedings of the State Entomologist until it is heard and decided. The court in regular or special session shall thereupon hear the objections, and is hereby authorized to pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case said cedar trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section eight hundred and eighty-six. If the court should find any damages or such expense sustained, he shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county, and such order shall be entered by the clerk in the law order book of the said court.

SECTION 892. Whenever the court orders any damages paid out of the general fund of the county under the preceding section, or the county treasurer makes any payments out of the general fund of the county under section eight hundred and eighty-nine, the said county shall be reimbursed by a specific levy of not exceeding one dollar and fifty cents per acre on all apple orchards planted ten years or more, and not exceeding fifty cents per acre on all orchards planted more than two years and less than ten years, in each magisterial district in which this law shall have become operative as hereinafter provided, but in the county of Shenandoah, the said county fund shall be reimbursed by a specific levy of not exceeding three dollars per acre on all orchards planted ten years or more, and not exceeding one dollar and fifty cents per acre on all orchards planted more than two years or less than ten years in each magisterial district in which this law shall become operative as hereinafter provided, if a single levy does not provide a sufficient fund to reimburse the county fund for the amounts paid out, as aforesaid, the levy may be repeated from time to time until the county fund is restored, but not more than one levy shall be made in any one year in the same district. The court awarding damages shall direct the commissioner of the revenue for the district or districts in which the law has become operative, to report at the next annual assessment the names of all owners of apple orchards over two years old and less than ten years old, and all owners of apple orchards over ten years old, in such district or districts, together with the number of acres owned by each person.

The court shall thereupon fix such specific amount per acre to be paid by each owner as will in the aggregate net the amount necessary to reimburse the county fund for all damages, and costs previously paid out under the provisions thereof.

The court shall enter an order directing each owner to pay his respective portion so ascertained to the county treasurer, and such order shall have the force and effect of a judgment of the court; if said amounts are not paid within thirty days from the date of said order the county treasurer shall proceed to collect the same as taxes are collected; provided, however, that all damages awarded

and assessments made therefor shall be by magisterial districts, each district bearing its own expense in the enforcement of this chapter; provided, further, that any orchard owner who is aggrieved by an erroneous levy or assessment made against him under this section, may apply by motion for relief against the same at the court that ordered the levy, at any time within twelve months after the date of the order ascertaining the amount to be paid by the several owners and directing payment; and if the court is satisfied that the applicant is erroneously assessed in such levy, either in whole or in part, it shall correct the same, directing that the applicant be exonerated from so much as is erroneously charged against him, if it is not already paid, and if paid that it be refunded to him.

Such motion shall be after five days' notice to the attorney for the Commonwealth, who shall represent the county at the hearing.

The amount fixed by the court upon orchards planted more than two and less than ten years shall be one-half the amount fixed by the court as a charge upon orchards planted ten years or more.

SECTION 893. The eight preceding sections shall not be in force in any county or in any magisterial district of any county until the board of supervisors thereof shall by a recorded vote accept and adopt the same for their county or magisterial district in their county, and such acceptance and adoption shall not make the same operative unless the circuit court of such county by an order duly entered shall ratify and approve the action of the board.

In the event the board of supervisors of any county neglect or refuse to accept and adopt the same for their county, or for any magisterial district of their county, then the majority of the qualified voters of said county or any magisterial district of said county, may request its adoption by petition addressed to the circuit court of said county, and when it appears from said petition that a majority of the qualified voters of said county or any magisterial district of said county request the adoption of said sections, then the said court shall declare the same adopted for such county, or for any magisterial district in such county, requesting their adoption.

An ACT to amend and re-enact section 885 of the Code of Virginia.

Approved March 16, 1920.

Acts, 1920, p. 370.

1. Be it enacted by the General Assembly of Virginia, That section eight hundred and eighty-five of the Code of Virginia be amended and re-enacted so as to read as follows:

Sec. 885. Red cedar trees; declared public nuisance, when.—It shall hereafter be unlawful within this State for any person, firm or corporation to own, plant or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be) the source, harbor or host plant for the communicable plant disease commonly known as "orange" or "cedar rust," of the apple, and any such cedar trees, when growing within a radius of two miles of any apple orchard in this State, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owner or owners of any such cedar trees to destroy the same as soon as they are directed to do so by the State Entomologist, as hereinafter provided.

FILED
JAN 11 1928
CHARLES ELMORE CROPLEY
CLERK

No. 199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JULIA V. MILLER, &c.,
Plaintiffs-in-Error,

vs.

W. J. SCHOENE,
State Entomologist of Virginia
Defendant-in-Error.

BRIEF FOR DEFENDENT-IN-ERROR

BRIEF FOR DEFENDANT-IN-ERROR

JOHN R. SAUNDERS, *Attorney General*

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The Herald Print, Woodstock, Va.

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BRIEF FOR DEFENDENT-IN-ERROR

STATEMENT OF FACTS

The original Cedar Rust Law was enacted in 1914, and was reenacted in the Code of 1919. In 1920, (Acts 1920, p. 370); in 1922, (Acts 1922, p 246), in 1924 (Acts 1924 p. 47), the Act was before the Legislature and amended.

Under the Act, the petition was filed before the State Entomologist by ten freeholders of the magisterial district requesting the State Entomologist to make a preliminary investigation to ascertain if the lands in the territory sought to be investigated contained cedar trees constituting the

host plant of the disease known as Cedar Rust disease, and whether the cedars if so found were a menace to the apple orchards within the two mile radius of the orchards. The State Entomologist made his preliminary examination and ascertained that the plaintiffs-in-error did own red cedars within said radius, and that the cedars were a menace to the health of said apple orchards, and accordingly as provided by the Act notified the plaintiffs-in-error of his finding and directed plaintiffs-in-error, as further provided by the Act, to cut down the red cedars, and thus abate the nuisance. (R. 41, 43.

The plaintiffs-in-error exercised, as they were entitled to do under the law, their right to take an appeal from the decision of the State Entomologist to the Circuit Court, (R 54), and there they presented their defenses, (R. 45), and the decision of the said court being unsatisfactory to them, they applied for a writ of error to the Supreme Court of Appeals, from whose decision they applied for a writ of error to the Supreme Court of the United States.

The cedar rust is a disease that first manifested itself viciously in the early years of this century, (R. 48), and has increased in virulence, until now successful apple production in proximity to the red cedar has become an impossibility. (R. 73, 74, 76, 78, 88, 92, 100, 109.) The apple industry it is shown will soon become extinct in the vicinity of cedars, if the cedar rust disease cannot be put and kept under control.

It has been demonstrated beyond successful contradiction that the cedar rust is a disease, and that its spores spend their existence, in part on the cedar tree and in part on the apple tree, and that it cannot exist in the absence of either the cedar tree or apple tree. The life cycle of the spores has been studied and definitely learned. (R. 49, 117.) The disease originally and until comparatively recent years lived alternately upon the wild crab apple and the cedar tree and only recently adapted itself also to the cultivated apple—at first to a few varieties, and now no variety may be said to be perfectly immune, while many varieties are being for all practical purposes destroyed. (R. 100, 118, 119.)

The disease attacks both fruit and foliage of the apple trees. (R. 48.) The foliage of some of the best varieties such as York Imperial and Jonathan is destroyed in mid summer and early fall; (R. 50) the fruit fails to mature and is worthless except to enlarge the unprofitable cull pile; (R. 73, 100), and the trees deprived of their power to breathe through their leaves, fail to continue their growth. (R. 51.) The disease is a disease of both the apple tree and the cedar tree. (R. 51.)

The Cedar Rust disease is carried by the atmosphere from the cedar galls ("cedar balls") in spring and early summer to the apple trees. (R. 119.) The zone of infection depends upon weather conditions and the direction of the winds. Removal of the cedar trees within a radius of two miles has been so far found to afford reasonable protec-

tion against ordinary outbreaks of the infection, though injury occurs during years favorable to the disease well beyond this distance. (R. 50.) The intensity of the disease depends upon distance from source of infection.

The spores from the cedars pass their summer existence on the apple and apple foliage and their remaining existence upon the cedar, being carried from one host plant to the other by favorable atmosphere, so that a large body of red cedars may have the capacity of deluging orchards with the disease spores, to be carried on to other cedar trees, and from the latter to still other apple orchards, constituting a possible link in an endless and destroying chain covering the area of the joint occupancy of land by the red cedar and the apple tree. (R. 49.)

The orchard industry in the Valley of Virginia is very valuable and extensive. (R. 69, 92, 105, 129.) In Frederick County, it has been described as the largest agricultural industry (R. 68.) Virginia whose apple producing territory is confined largely to the Valley of Virginia, ranks 3rd or 4th in production among the States of the Union. (R. 116.) Near New Market, the southern end of Shenandoah County, and within a few miles of the Miller cedars are to be found some of the largest orchards in the State. (R. 92, 126.) Within a radius of 1 mile of the Miller cedars is one orchard of about 25 acres and 4 or 5 smaller orchards, all of which are rendered worthless. Within a radius of 2 miles there are other orchards, includ-

ing the Driver orchard of about 20 acres, and a short distance beyond, numerous other orchards very large in size. (R. 92, 125, 126, 132, 133.) The lands in the New Market territory are especially well adapted to apple growing. (R. 71, 92, 105, 106, 107.)

Among the industries made necessary by the large apple production in the Valley section may be mentioned large cold storage houses—the city of Winchester alone having two storage plants with a combined capacity of a half million barrels and the largest apple canning and apple by-product plant in the World. (R. 69.) Railroads are necessarily kept busy in apple seasons, and a very large number of men and their families are given employment in the production, harvesting and marketing of the fruit, and in the allied industries. (R. 64, 93.)

The food value of the quantities of fruit consumed at home, and placed upon the markets, domestic and foreign, is very great, and practically beyond computation.

The value of farm lands for all practical purposes is increased by the removal of the cedars, the harbor and source of the infection (R. 66, 67, 71, 84, 87, 93, 101, 107, 123, 124), and the territory becomes more attractive and valuable for those living there, while the county and state treasuries are gathering increasing revenues from the increased production and enhanced land values. (R. 72, 78, 79, 81.)

The cedar trees are indigenous to the Valley lands. Their value, as shown by the evidence, is negligible in general, and equally so in this particular case. (R. 90, 131, 125.) The trees are not grown commercially, and from the testimony of witnesses of plaintiffs-in-error and others the cedar trees and cedar bushes on the lands are of no substantial value, and are not comparable in value to the apple orchards. (R. 127, 131.)

The cedar trees sought to be cut down consist of about 215 small and large, 2 1-2 to 10 inches in diameter, distributed along both sides of a roadway, with fields on both sides; a small cedar grove of about two acres; about 148 more in a lot of 4 to 6 acres, and several hundred cedar bushes scattered in the fields that have been permitted to encumber the ground, and a few trees elsewhere. (R. 121.)

The cedar trees are similar to those of apparently same size and condition in the vicinity and are generally doted. (R. 124, 125.) The lumber value of the cedars as shown by plaintiffs-in-error themselves is negligible, the six inch size, for a single cut having a sale value as lumber of about 12 cents at most, which price would include cost of cutting, logging, hauling, sawing and marketing.

But whatever the cedars are actually worth when cut down, the plaintiffs-in-error are not deprived of the material. Not a stick of the cedar tree is taken by the Entomologist.

To control the disease, and as the only method of control, the cedars must be cut down, but in

abating the nuisance, the least practicable injury is done. Thus, the trees are cut down without cost to the cedar tree owner; the trees are trimmed closely, and to the size of 2 inches at the small end; the limbs likewise trimmed into wood and down to the size of 2 inches; the brush are piled, and even burned if desired; and in addition an allowance is made to the cedar tree owner for any incidental injury done to the land, in the cutting down of the cedar trees, and in superintending the work. (R. 153.)

The actual cost of cutting down all the red cedars, and doing all the work carefully, as provided by the order, would be in the instant case approximately $150.00, which will give some further idea of the few cedars that are to be removed. (R. 98, 103.)

The court in the case of Bowman v. Entomologist, makes it a matter of common knowledge that the cedar trees in the Valley are of very little value for any purpose, and are actually negligible commercially in value, and the evidence shows this to be especially true in present case. (R. 124, 125.)

The actual value of the cedars was de minimis; the removal of the cedars enhanced the actual value of the land for grazing and other farm purposes. The order provides payment to plaintiffs-in-error for the compensation as provided by the act as construed by our highest court. (R. 144, 145, 147, 152.)

THE ARGUMENT

The Act of 1914, as amended from time to time to 1924, and its continued existence upon the statute books of the state, is a plain and impressive recognition of the importance of apple growing in Virginia, and the public necessity for its protection and development. The Act as amended from time to time and as construed by the Supreme Court of Appeals of Virginia, provides fairly and reasonably for the exercise of the police power of the state, to save a great agricultural industry of the state, and is not amenable to the contention that it in any way contravenes Sec. 1, of the Fourteenth Amendment.

Defendant-in-error relies upon the right to the construction placed upon the statute by the Supreme Court of Appeals upon the statutes and insists the following matters have been determined and concluded thereby:

(a) That all cedar trees are a menace, or may be a menace, to apple orchards in proximity to cedar trees.

(b) The measure of damages contemplated by the statute.

(c) The meaning of "freeholders" and "locality" as employed in the statute.

(d) The meaning intended b ythe Legislature to be conveyed by the word "orchard" and that the term "orchard" contemplated orchards shown to

have been within the 1 mile and 2 mile limit of the Miller cedars.

THE STATUTE IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT

The contention of plaintiff is that the act is repugnant to Sec. 1, of the Fourteenth Amendment, that is to say:

(1) That it deprives plaintiff's-in-error of their property, without due proces sof law; and

(2) That it denies plaintiffs-in-error of the equal protection of the laws.

These propositions are set forth in varying forms in their assignment of errors.

EFFECT OF STATE SUPREME COURT'S INTERPRETATION OF STATUTE

American Railway Express Co. v. Kentucky, U. S., 71 L. Ed. (Adv. 457.) Edward Hines Yellow Pine Trustees v. Martin, U. S. 71 L. Ed. (Adv. 607.) North Loraimie Land Co. v. Hoffman, 268 U. S. 282, 69 L. Ed. 563. Fidelity Nat. Bank & T. Co. v. Swope, U. S., 71 L. Ed. (Adv. 559.) Charles H. Graves, Plaintiff v. State of Minnesota, U. S., 71 L. Ed. (Adv. 143, 145.) Herbert v. Louisiana, U. S. 71, L. Ed. (Adv. 113.)

The record of this case shows that the petition containing at least 10 qualified freeholders of Lee Magisterial District was presented to the State Entomologist; that the Entomologist made pursuant thereto a preliminary investigation to ascertain whether there existed red cedars within the prescribed area, constituting a menace to the orchards of the locality; that the State Entomologist duly made the investigation, and finding that the plaintiffs-in-error owned cedars within the proscribed area constituting the host plant of the disease, and a menace to the apple orchards, also duly notified, as provided by the statute, the plaintiffs-in-error of the result of his investigation, and directed the owner to cut down within a specified time the offending cedars; that an appeal, as provided by the act, was promptly taken by plaintiffs-in-error, and a full and fair trial was had before the Circuit Court where the plaintiffs-in-error presented their objections and defenses to the proceeding; that plaintiffs-in-error have not been deprived of their property without due process of law, nor have they in any sense been denied the equal protection of the law.

Defendant-in-error insists that the Cedar Rust Act provides for the reasonable exercise of the police power of the state for the control of the cedar rust disease; that there exists a perfectly reasonable relation between the character of the legislation and the policy to be subserved; and that the act does not provide for "an warranted and arbitrary interference" with the constitutional

rights of plaintiffs-in-error; but that on the other hand it does provide, as do similar acts of other states, for the reasonable exercise by the state of the police power of the state, for the control of a disease, which if not eradicated o rcontrolled will certainly result in the extinction of the orchard industry—one of the leading agricultural industries in Virginia.

I.

PLAINTIFFS' CONTENTION THAT THE STATUTE IS INVALID IN THAT IT PROVIDES FOR THE TAKING OF PRIVATE PROPERTY, NOT FOR PUBLIC USE, BUT FOR THE BENEFIT OF OTHER PRIVATE PERSONS.

This contention will be considered more fully in connection with centention of Plaintiffs-in-Error II. In refutation of this contention defendant at this point cites:

Bowman v. Entomologist, 128 Va. 351; 105 S. E. 141; 12 A. L. R. 1121, and annotation; Kelleher v. Schoene, 14 F. (2l.) 347; Kelleher v. French, 22 F. (2d.) 343; Balch v. Glenn (Kans.), 43 L. R. A. (N. S.) 1080; Los Angeles County v. Spencer (Cal,) 77 Am. St. R. 217; State v. Main (Conn.), 36 L. R. A. 523; Colville v. Fox (Mont.) L. R. A. 1915 F. 894; Louisiana State Board v. Tanzmann, L. R. A. 1917 C 894.

II.

THE CONTENTION THAT THE ACT CANNOT BE SUSTAINED AS A LEGITIMATE EXERCISE OF THE POLICE POWER

It is true, as state dby plaintiffs-in-error, that defendant-in-error contends, as the basis of the proceeding that the state has the right to cut down the cedar trees in the exercise of the police power; and defendant-in-error insists that reasonable regulations, whether under crop pest or special laws enacted to prevent infection of trees and orchards have uniformly been held everywhere to be within the police power. It is not contended, of course, that one man's property may be taken for the benefit of others, but it is contended that in the enjoyment of property the owner shall not use it in a way as to endanger the rights and property of others. The evidence in this case discloses that the plaintiffs-in-error are maintaining a constant menace to the orchard business and thus to the general welfare. It is insisted that they have no more right to use their land in growing such trees, than to use it to keep cattle afflicted with or exposed to "foot and mouth" disease, or for maintaining any other business which endangers the safety, morals, health or general welfare of the community. Kelleher v. French Vol. 22 (2) 343.

In the annotation to case of Bowman v. Entomologist, 12 A. L. R. 1136 (128 Va. 353, the editor

recognizes generally the constitutionality of similar acts in the following language:

> "It is well established as a general proposition of law that reasonable regulations enacted to prevent the spread of weeds or noxious vegetation, and to ***prevent the infection of trees, orchards and crops,*** are within the police power of the state."

And again at page 1138, the editor further stated, without a suggestion of doubt or uncertainty:

> "Statutes enacted for the ***purpose of protecting orchards,*** trees and crops from contagious and infectious diseases have uniformly been held to be within the police power of the state, and their constitutionality has been sustained, except in several instances where the particular statutes failed for some reason to meet constitutional requirements."

In 1920, the case of Bowman v. Entomologist was decided by the Supreme Court of Appeals. From that date for seven years the correctness of that decision has not been successfully challenged, and under the law as construed, large areas of lands have been relieved of the menace. (R. 78, 80, 83, 95, 101, 110, 152.)

In that case (p. 370, 1), the court said:

"That the destruction of the red cedar in said sections which thus constitute a menace to the apple trees is absolutely necessary to prevent the extinction therein of the apple industry. That they are not planted or cultivated but are indigenous to the soil, springing up where the soil is not cultivated and growing wild. That they are valuable only when they have attained a sufficient size to make posts or fuel x x x Under the statute in question, all of the posts of the trees available for fuel o rfence posts are left undestroyed and remain the property of the owners x x x. ***Certainly as compared wit hthe value of the apple trees to which their existence is a serious menace, their value is de minimis.***"

Kelleher v. Schoene, 14 Fed. (2d) 348—

"All property rights are held subject to the fair exercise of the power to make regulations that are reasonably necessary to secure the welfare of the community. If the regulation is not capricious, arbitrary or unjustly discriminatory, and the means employed have a real relation to the ostensible purpose, the statute may be a valid exercise of the police power. x x x The fact that only one class, the owners of infected red cedar trees are injured by the statute does not deny the equal protection of the laws, since all of such owners are equally subject to the law."

Lawton v. Steele—

162 U. S. 136, 38 L. Ed. 388:

"The extent and limit of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, x x x Beyond this however, the state may interfere wherever the public interests demand it, and in this particular case a large discretion is necessarily vested in the legislature to ***determine not only what the interests of the public require, but what measures*** are necessary for the protection of such interests."

Bacon v. Walker,

204 U. S. 317, 51 L. Ed. 502:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341. In that case ***we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed***

to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended commend on the 2-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing.

"This view of the power of the state, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly, or unsanitary. ***It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.*** This is the principle of the cases which we have cited." Buchanan v. Worley—

245 U. S. 74, 62 L. Ed. 74:

"The authority of the state to pass laws in the exercise of the police power having for their object the protection of the public health, safety and ***welfare,*** is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise

of this power, embracing nearly all legislation of a local character, ***is not to be interfered with by the courts where it is within the scope of legislative*** authority, and the means adopted reasonably ***tend to accomplish a lawful purpose.***"

Thomas Cusack Co. v. Chicago,

242 U. S. 530, 61 L. Ed. 475:

"We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision, the limits of the police power, yet the disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the Judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will ***interfere with*** the action of such authority ***only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare.***

Chicago, B. & Q. R. Co. v. Illinois—

200 U. S. 592, 50 L. Ed. 609:

"We hold that the police power of a state

embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. Ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. Ed. 525, 527, x x x And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."
id. 594, L. Ed. 610:

"But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly evistence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Bowman v. Entomologist: 128 Va. 360,

"Is the act x x x valid as enacted under the police power of the state, for the protection of the public interest, and is it a valid exercise of such power?"

"This question must be answered in the affirmative."

Concerning the opinion in the Bowman case in its discussion of the due process and equal protection clauses of the 14th Amendment, Judge McDowell, in Kelleher v. Schoene, p. 346, said:

"While we regard the opinion in the Bowman case as well reasoned, it is in respect to the federal constitutional question merely persuasive, and the plaintiff is entitled to have the independent judgment of this court as to these questions."

Corpus Juris, Vol. 12, p. 904:

"As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States are reserved to the several states." (Section 412).

"The police power is to be clearly distinguished from the right of eminent domain;

and the distinction lies in this, that in the exercise of the latter right, private property is taken for public use and the owner is invariably entitled to compensation therefor. While the ***police power*** is usually exercised merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, ***it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may*** sustain in consequence thereof" &c. (Sec. 413.)
Ruling Case Law, Vol. 6, p. 189:

"The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within certain limits, so that the powers of government control may be adequate to meet changing social, economic and political conditions. It is very broad and comprehensive and is liberally understood and applied. The ***changing conditions of society make it imperative for the state to exercise additional powers,*** and the welfare of society may demand that the state should assume such powers."
id 206:

"The police power extends to the enactment of all such wholesome and reasonable laws, not inconflict with the Constitution of

the state or the United States as they may deem conducive to the public good. This may ***include legislation to increase industries of the state, develop its resources,*** and add to its welfare and prosperity."

Ruling Case Law, Vol. 1, p. 790:

"While in a strict sense this discretion is judicial in its nature, it does not constitute a delegation of 'judicial powers' within the meaning of the usual constitutional inhibition against the delegation of judicial powers to an administrative officer. Consequently, statutes providing for the summary destruction of vegetation infected with contagious pests, without any prelimianry judicial inquiry and without compensating the owner for the resulting loss, are perfectly constitutional so long as they themselves define what constitutes a nuisance, and there is a right to a subsequent judicial review of the action of the administrative officer. A property thus destroyed is confiscated under the police power of the state, the owner thereof is not entitled to be compensated as a matter of right."

Lewis on Eminent Domain—3d. Ed., Sec. 6:

"Whatever restraints the legislature imposes upon the use and enjoyment of property withing the reason and principle of this duty, the owner must submit to, ***and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not***

a taking, an exercise of police power and not of eminent domain. To destroy property because it is a public nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner, and to put an end to its existence, because it could not be used consistently with the maxim sic utre tuo ut alienum non laedas."

American State Reports, Vol. 77, p. 221:

"The lesiglature has the power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, to be nuisances, ***although not such at common law.***"

Mugler v. Kansas, 123 U. S. 623; Noble State Bank v. Harkell, 219 U. S. 104, 55 L. Ed. 112; Eubank v. Richmond, 226 U. S. 142, 57 L. Ed. 158; Fertilizer v. Hyde Park, 97 U. S. 650; Encyclopedia Supreme Ct. Reports, Vol. 9, p. 473, 475.

Louisiana State Board v. Tanzmann,

L. R. A. 1917 C 894:

"The owners of the other groves are entitled to protection now before the destruction emanating from defendant's place overtakes their groves."

Balch v. Glenn,

L. R. A. (N. S.) 1080, 119 Pac. 67 (Kansas) (syllabus)

"The statute is designed to protect and promote the horticultural interests of the state, and in effect makes all orchards, trees, shrubs and plants infested with the pests mentioned, in the statute, public nuisances, and being a proper exercise of the police power, it is not unconstittuional because it authorizes the expense of abating such nuisances to be charged against the property of the owner."

"The statute is not invalid because it delegates to the commisison the power to declare the existence of conditions which call into operation the provisions of the statute."
County of Los Angeles v. Spencer,

126 California 670, 77 Am. St. R. 220:

"It is well known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is, therefore, a proper exercise of the police power." x x x

Louisiana State Board v. Tanzmann,

Ann. Cases 1917 E 217, 73 So. 854 (syllabus):

"The destruction by legislative authority

of orange trees affected by a disease for which no cure has been discovered, and which is highly contagious and infectious ,is not a taking of such property without due process of law, but is a competent exercise of the police power of the state."

State v. Maine,

37 Atl. 89, 61 Am. St. Rep. 30:

In that case it was held that the statute requiring the destruction of peach trees infected with a disease known as "Yellows" without compensation, was a proper exercise of the Police Power.

Howard v. State,

242 S. W. 818, 154 Ark. 430:

In that case, the plaintiff-in-error was ordered, under regulations promulgated by the Crop Pest Board, to cut down his cedar trees, at his own expense. Under the law, a penalty was authorized and plaintiff-in-error refusing to carry out the order for the cutting of the cedars, was convicted in the lower court, and upon appeal, the judgment of the lower court was affirmed, with apparently every possible assignment of error made.

Other authorities—

Constitution, Article X.:

Hamilton v. Kentucky Distillery Co., 251 U. S. 156, 64 L. Ed. 199;

Purity Extract Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184;

Schmindingre v. Chicago, 226 U. S. 578, 57 L. Ed. 364;

Colvill v. Fox, 149 Pac. 496, L. R. A. (N. S. 1915 F 895;

Wedemyer v. Crouch, 43 L. R. A. (N. S.) 1080;

Noble State Bank v. Haskall, 219 U. S. 104, 55 L. Ed. 112;

Arkansas v. Kansas T. & Coal Co., 183, N. S. 189, 46 L. Ed. 146.

Nor is there anything in the cases cited by plaintiffs-in-error that militate against the contention of defendant-in-error.

Lockner v. New York, 198 U. S. 45, and Dobbins v. Los Angeles, 195 U. S. 233, and other cases cited, in no way seem to be at variance with the other cases cited by defendant-in-error.

In the case of Penna. Coal Co. v. Mahon, 260 U. S. 393, is not in point. In that case, the owner of land, sold the surface, and retained the underlying coal, with right to mine it. The Legislature had enacted a law prohibiting the mining of coal under private dwelling or streets or in cities in places where the right to mine such coal was reserved by the mine owner in the grant of the surface. The court by a majority opinion held that the effect of the act was to deprive the mine owner o fthis private property without due process of law, and that

as a regulatory statute the law went too far, and was taking of property for which compensation should be made, and while manifestly a close case, by the majority opinion of the court, the statute was declared as extending authority beyond the reasonable exercise of the police power of the state.

The decision is certainly not in point to maintain that a few scattering cedar trees of very little if any substantial value, should be permitted to stand when containing disease spores of the most virulent type at the point of annihilating a very necessary and valuable industry of this and other states.

As hereinabove suggested, the legislation is not novel. Among the states that are controlling or have the power to control the disease by cutting down of the cedars, whether under special act or crop pest regulations, are: Arkansas, New York, Illinois, West Virginia and Pennsylvania, and it is not believed any case will be cited showing a similar act to have been declared unconstitutional by any court.

In addition to what has been said, in answer to the contention that the act is not a proper exercise of the police power of the state, reference is further made to Bowman v. Entomologist, 128 Va. 351, 105 S. E. 141; 12 A. L. R. 1121.

III.

CONTENTION THAT THE CONTROL OF PROPERTY OF PLAINTIFFS-IN-ERROR IS NOT EXERCISED UNDER THE STATUTE, BY OTHER OWNERS OF PROPERTY

The statute in providing that it should be necessary to have ten freeholders in the unit consisting of the district or county, as the case may be, evidently contemplated that there should not be an arbitrary and unnecessary demand upon the Entomologist, and that this provision should at least be a guaranty of good faith in any request for an investigation.

All that the 10, instead of 1, could do was to request a "preliminary investigation." These 10 had no controlling power except to require an investigation to be made. If 10 freeholders cannot be found willing to have an investigation made, and the cedars cut and expense borne by the orchardists of the district or county, as the case may be, it would be quite convincing that the cedars should not be cut.

The argument raised by the plaintiffs-in-error against some personal setting in motion of the machinery would apply in other cases—civil and minor criminal matters. In ordinary practice, the building of new roads, and new bridges, is instituted by a petition.

But the draftsman of the Cedar Rust Act must have had before him, the provision of the Code of Virginia relating to abatement of nuisances, the constitutionality of which will hardly be doubted. That act provides as follows:

> "When complaint is made to the Circuit Court of any county, or the corporation court of any city of this state, by five or more citizens of any county, city or town, setting forth the existence of a public or common nuisance, the court or Judge thereof in vacation shall summon a special grand jury x x x to investigate such complaint; and if upon a full investigation of such complaint the grand jury is satisfied" &c.

This statute was declared constitutional in Jeremy Improvement Co. v. Commonwealth, 106 Va. 482, 56 S. E. 224.

Judge Parker, Circuit Judge in Kelleher v. French, 22 F. (2d.) 343, says:

> "In this respect the procedure is analogous to that prescribed by section 1520 of the Code of Virginia relating to public nuisances, which provides that upon complaint of five or more citizens of a county that a public nuisance exists therein, a special grand jury shall

be summoned to investigate the complaint, and if found to exist to institute proceedings looking to the abatement."

Judge McDowell in Kelleher v. Schoene, 14 F. (2d.) 347, uses this pertinent language:

> "So long as a request is not signed by 10 freeholders, the owner of cedar trees remains undisturbed, and the signing of a request does not determine anything except that at least 10 freeholders desire that an official search for infected cedar trees be made in some designated territory. The provision in question tends to protect the owners of cedar trese from possible official overzealousness, as well as the orchardists from the ultimate payment of damages and expenses, incurred in the possibly unnecessary destruction of the trees."

In the case of Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, is relied upon by plaintiffs-in-error, in their contention that this provision of the statute denies to them due process and equal protection of the law; but defendant-in-error contends that there is a wide difference between the two cases.

In the Eubank case, the Supreme Court held invalid a city ordinance which required the committee on streets of the city to establish a building line upon the request of two-thirds of the property owners abutting on the street, and inhibited the erection of any building beyond the building line thus established.

The Supreme Court of Virginia, referring to Eubank case and quoting Kelleher v. Schoene (R. 164,) said:

> "This statute differs so widely from the ordinance involved in Eubank v. Richmond x x x and from the statutes in the other cases cited by counsel for plaintiff, that we think it profitless to discuss these cases."

Judge Parker, in Kelleher v. French, 22 F. (2d) 343, with reference to the Eubank case, said:

> "It is manifest that the principle decided in that case has no application to the case at bar. The only similarity between the two cases is that in each case, the statute provides for action by public authorities upon request of property owners. In the Eubank case, however, the request of the property owners was mandatory, and the action by the public authorities merely carried out their will. Here the request of the freeholders merely imposes upon the State Entomologist the duty of making inquiry and does not control the action."

In North Laramie Land Co. v. Hoffman, 268 U. S. 282, 69 L. Ed. 957, the court said:

> "The supreme court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound. x x x In consequence, it has

been uniformly held that statutes providing for ***taxation or condemnation of land may adopt a procedure, summary in character,*** and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject-matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

IV.

CONTENTION THAT THE STATUTE IS VOID FOR VAGUENESS AND UNCERTAINTY

This contention appears to be based upon the alleged uncertainty as to who are contemplated by the statute as eligible "freeholders."

The Supreme Court of Appeals necessarily determined that in the present case the petitioners applying to the Entomologist were those contemplated by the statute. That no reliance was made by plaintiffs-in-error, that the petitioners were not eligible to sign, or that any question could be raised as to the sufficiency of the freeholders or the petition, is manifest from the "Stipulation" in the trial court (R. 47), as follows:

"It is stipulated between counsel that counsel for the defendant waive the introduction of evidence to show that the petition upon which the notice to the defendant from the State Entomologist is founded was properly signed by the requisite number of freeholders; and waive any right to raise any question predicated upon the lack of such proof."

But regardless of the binding force of the decision of the Supreme Court of Appeals, and of the Stipulation of parties, it is insisted that there is no uncertainty as to what is meant by the word "freeholders," or who were intended to be included as applicable to this case.

Section 893 of the Code provides that the Act shall not be inforce until the Board of Supervisors of any County shall by a recorded vote adopt the same for ***their county or magisterial district in their county.***

Sec. 886 says:

"In ***any county in the state,*** where the above mentioned disease exists x x x upon the request in writing of 10 or more reputable freeholders of any County or magisterial district to make a preliminary investigation of the locality from which said request is received" &c.

It cannot, therefore, be fairly contended that the statute contemplated that persons owning real estate anywhere outside of the state would have the right to petition, or that the use of the word "freeholders" as employed in the statute renders the act unconstitutional, on the ground of vagueness or uncertainty.

V.

THE CONTENTION THAT THE ACT IS IN VIOLATION OF THE CONSTITUTION, BY REASON OF ALLEGED UNCERTANTY OF THE WORD "LOCALITY"

Bearing in mind that the purpose of the petition is only to start an investigation, it is plain that the word "locality" when used in that connection related to the territory within two miles of an apple orchard. The direction by the petitioners is necessarily general, and when the investigation has been made, the proceeding to cause the removal of the cedars is commenced by notice of the Entomologist to the cedar tree owner.

Judge Burke, speaking for the court (R. 165) well says:

> "Aside from the fact that this assignment is concluded by the Bowman case, we do not

think there is any doubt or uncertainty about the use of the word 'locality' in that section. The statute is to be read as a whole, and when so read, it is fairly plain, that what was to be investigated was the existence of the infected red cedar trees within two miles of an apple orchard x x x The location of the cedars and their distance from an apple orchard or orchards, is the subject of investigation and this is the locality referred to in the statute."

And the court quotes Judge McDowell, speaking for the court in Kelleher v. Schoene (R. 165), as follows:

"A reasonable construction of the statute as a whole requires that the signers of any request to the Entomologist must own estates of freehold in the county or district, as the case may be, x x x and does not mean that the freeholders who sign, must reside in, or must own estates lying in any particular 'locality'."

VI.

THE CONTENTION THAT THE ACT IS UNCONSTITUTIONAL BECAUSE OF UNCERTAINTY IN MEANING OF WORD 'ORCHARD'.

The meaning of the word orchard is common-

ly well known. But the highest State Court having necessarily construed the word to include the apple trees sought to be protected in the case, the construction should for the purposes of this case be accepted.

As was said by Circuit Judge Parker, speaking for the Court (22 F. (2d.) 344(:

> "The next point is that the statute is invalid because of vagueness and indefiniteness. The contention is based upon the use of the words 'orchard' and 'locality,' and may be disposed of in a few words. The word 'orchard' has always had a well understood meaning and the use of such a term could not possibly render the statute void for vagueness" &c.

VII.

THE CONTENTION THAT PRIVATE PROPERTY IS TAKEN UNDER GUISE OF POLICE POWER FOR PUBLIC USE WITHOUT COMPENSATION.

No successful effort was made by plaintiffs-in-error to show that the cedars sought to be cut down as necessary to eradicate the cedar rust, possessed any appreciable value. The trees on the Mil-

ler lands were on the other hand shown affirmatively to be inconsequential. Our courts have accepted it as a matter of common knowledge that the red cedar trees possess a negligible value, and in the instant case, in the assignment of error, there is no assertion that the trees in themselves do possess any appreciable value.

The question, of course, we must remember is not whether the court construed the act properly, but whether with the construction given, the act is in violation of Sec. 1, of the Fourteenth Amendment.

Chicago &c. R. R. Co. v. Illinois, 200 U. S. 592, 57 L. Ed. 593, is quoted by plaintiffs-in-error; but continuing further the quotation is found at bottom of page 593 in the following language:

> "Upon the general subject, there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular cases within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury, does not attach under the Con-

stitution. Such is the present case. There are unquestionably limitations upon the exercise of the police power which cannot under any circumstances be ignored. But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. ***It has always been hold that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.***"

In Bowman v. Entomologist, 128 Va. 360, decided nearly 8 years ago, the court held that the cedar tree owner was not entitled to compensation "as a matter of right," that is to say, he was only entitled to received that which the statute provided he should be paid. This decision has become a rule of property. Under the law, the cedar trees in the large orchard areas of the Valley have been cut down. Nor have plaintiffs-in-error shown any good reason why the owner of the offending cedars should be entitled to compensation other than such as is specifically allowed by the act, for maintaining what the Legislature 13 years ago declared to be a public nuisance, and should be rendered harmless. No land is taken. The cedar trees

are cut down, but their products are not taken from the property; the trees are cut down, trimmed, the poles saved for the cedar tree owner; the wood trimmed out for him, and a small allowance made him as a compensation for incidental damage done in the act of cutting; and as shown overwhelmingly by the evidence, the land with the cedars removed is enhanced in actual value.

Surely, the Legislature of Virginia in 1914, was not actuated by improper motives in enacting this law that places no burden of expense upon the cedar tree owner to abate the nuisance upon his own land, nor were subsequent legislatures guilty of wrong doing in amending the Act in 1920, 1922, and 1924, instead of repealing it; nor does the Act as construed provide for a mere arbitrary or capricious exercise of the police power bitrary or capricious exercise of the police power of the state, as contended by the plaintiffs-in-error.

The court in American Railway Express Co. v. Kentucky, U. S. , 71 L. Ed. (adv. 457) plainly expressed the conditions under which interference would be made as follows:

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for

the protection and enforcement of private rights.'"

The annotation to Bowman v. Entomologist, 12 Am. L. R., 1138, 1143, furnishes, it is believed, a satisfactory answer to this specification of error where the following cases are quoted:

Balch v. Glenn (Kans.) 43 L. R. A. (N. S.) 1080 (providing for the ***extermination of San Jose Scale and other orchard pests at the owners' expense):*** Los Angeles County v. Spencer, (Cal.) 77 Am. St. R., 217 ***(making the expense of abating the nuisance a lien upon the premises of the owner);*** State v. Main (Conn.) 36 L. R. A. 623, ***(providing for the destruction of peach trees affected with Yellows, without compensation);*** Colvill v. Fox (Mont.) L. R. A. 1915 F 894 ***(holding the destruction of fruit lawful for the protection of others);*** Carstens v. DeSellem, 144 Pac. 934 ***(holding destruction without notice of pear trees affected by fire blight lawful);*** Los Angeles Berry Growers Co-Op. Assn. v. Huntly, 146 Pac. 373; Louisiana State Board v. Tanzmann, L. R. A. 1917 C 894 ***(holding the destruction of orange groves affected by canker, without compensation, lawful).***

In conclusion, it is submitted that plaintiffs-in-error have not shown that the Cedar Rust Law is repugnant to Sec. 1, of the Fourteenth Amendment to the Federal Constitution; but that on the

contrary it affirmatively appears the act provides for a reasonable exercise of the police power of the state.

Respectfully submitted,

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